91-775

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE KLEINMANN,

Petitioner,

v.

MARIO CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK, THE STATE OF NEW YORK AND ARTHUR Y. WEBB, AS COMMISSIONER OF THE NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI PETITIONER'S BRIEF

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QUESTIONS PRESENTED

I

DID THE SECOND CIRCUIT COURT OF APPEALS SANCTION A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHICH CALLS FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION?

II

DID THE SECOND CIRCUIT COURT OF APPEALS DECIDE A QUESTION OF FEDERAL LAW i.e., AGE DISCRIMINATION CLAIM, IN A MANNER WHICH IS IN CONFLICT WITH RULINGS OF OTHER CIRCUITS AS WELL AS WITH DUE PROCESS AND EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT?

PARTIES TO THE PROCEEDINGS

The parties to this petition are the same as the parties to the appeal and civil action below, as reflected in the Caption.

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This is a petition for a writ of certiorari on behalf of Appellant George Kleinmann ("Kleinmann") in support of his appeal from District Court judgments dated June 13, 1989, and June 20, 1990, and from judgments of the Second Circuit Court of Appeals on January 18, 1990, January 3, 1991, and February 27, 1991. On May 31, 1991 the Court ex parte granted an extension of time to file a Petition for Writ of Certiorari. This Petition for a Writ of Certiorari is filed pursuant to Rule 10.1(a) of the Rules of this Court.

STATUTORY PROVISIONS AND RULES

Rule 10.1(a) of the Rules of this Court provide in pertinent part:

> (a) When a United States court of appeals has rendered a decision in

> conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort, or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

There exists a conflict between the Second Circuit and the Fifth Circuit as well as with the Second Circuit itself, with respect to equal protection and due process.

STATEMENT OF THE CASE

Kleinmann challenged acts of Appellees Mario Cuomo, et al. ("State") in laying him off as a violation of the Age Discrimination in Employment Act, 29 U.S.C. Sections 621 et seq. (ADEA). Kleinmann claims he was selected for

layoff because of his age and "opposed" the State's acts, with the result that the State retaliated against him by denying him displacement and recall rights provided to other employees. The State's denial of Kleinmann's rights constituted Age Discrimination.

The Equal Employment Opportunity Commission ("EEOC") found that the State discriminated against Kleinmann on the basis of Age and that the State retaliated against Kleinmann for his opposition to its acts. Kleinmann instituted an action in Federal Court.

After a nonjury trial, the Hon. Con G. Cholakis issued a decision and judgment in favor of the State dismissing Kleinmann's claim that he was laid off because of his age but did not address the retaliation claim.

The first appeal addressed the dismissal of the age discrimination claim and the District Court's failure to address the retaliation claim. The Second Circuit Court of Appeals remanded to the District Court for specific findings on the retaliation claim. The second appeal was from the June 20, 1990 District Court Judgment which found no basis for the retaliation claim and District Court decision dated June 13, 1989, which found no basis for the age discrimination claim.

The Second Circuit Court of Appeals affirmed the District Court without opinion by Order dated January 3, 1991. Appellant filed a Motion for Reargument pursuant to Rule 40 of the Federal Rules of Appellate Procedure. The Second Circuit Court of Appeals did not render a

decision on the Motion for Reargument but did act on an application for a rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. By Order dated February 27, 1991, the Second Circuit Court of Appeals denied the application for a rehearing en banc but did not rule on the original Rule 40 Motion for Reargument. On March 11, 1991, the Second Circuit Court of Appeals issued a third decision which appears to have been a copy of the first page of the January 3, 1991 decision.

STATEMENT OF FACTS

On May 4, 1983, George Kleinmann was laid off from his position with the State of New York. Prior to that he worked as an Administrative Assistant with the Office of Mental Retardation and

Developmental Disabilities ("OMRDD"), an agency of the State of New York (A-6-7, 20, 238).* At the time of his layoff Kleinmann was 57 years old with 20 years of State service (A-9, 20).

For many years Kleinmann worked in OMRDD's Albany, New York central office and in the years immediately prior to 1982, had applied for some 27 promotions. In each instance, except one, Kleinmann was never given an interview, despite being qualified (A-5, 11). In at least one instance he complained to OMRDD's Affirmative Action Officer of being excluded from promotional

* All references to Appendix will be made by referring to "A" followed by the page number, i.e. (A-1).

opportunities because of his age (A-5, 11; 19-21). Kleinmann submitted that his immediate supervisor at the time, Henry Radzminski, was at least partially responsible for the lack of promotional opportunities (A-11). That protest resulted in Kleinmann getting his one and only interview.

In January, 1982, Kleinmann became aware that his entire office would be moved to another location in Albany. Kleinmann's immediate supervisor, Radzminski, also would be transferred to the new location as part of the move (A-536-537). In an effort to avoid changing work locations and, in the process, work under supervision of a different person, Kleinmann received a job transfer; Kleinmann and a Clyde Niles exchanged job items (position) (A-153,

157, 586). At that time Niles was a Senior Administrative Assistant, a Civil Service Grade 23 item. Kleinmann's item was Administrative Assistant, Grade 18. They simply changed job assignments and their respective salaries were not adjusted (A-312-316, 414-417, 541-544). The transfer resulted in Kleinmann remaining in the same office location, but with a new supervisor, Robert Norris (A-589).

Kleinmann continued to assume the duties formerly performed by Niles until being assigned to another supervisor, Thomas Cuite (A-7). Cuite came from outside OMRDD and had no previous exposure to the work performance of either Kleinmann or Niles (A-577, 582-586). On January 3, 1983, Cuite informed Kleinmann of a reassignment effective

January 5, 1983, to work under former supervisor, Radzminski (A-7, 20-21, 588-589, 663-664) which required Kleinmann to change work locations. Niles also was reassigned to Niles' former job function and work location. Kleinmann met with McKinley Jones, OMRDD Affirmative Action Officer, to protest that his reassignment constituted an act of age discrimination. Kleinmann asked the Affirmative Action Officer to investigate this claim (A-21) and filed a grievance on January 4, 1983 challenging the reassignment (A-21-22) which was later amended to specifically include a reference to the Union Contract clause prohibiting age discrimination. OMRDD claims some confusion as to the date that they received this amendment. The State admits that it was received no later than March 2, 1983 (A-24). That

grievance was further supplemented on March 18, 1983 with another grievance filed under Kleinmann's Union Collective Bargaining Agreement, specifically charging OMRDD with a violation of the Union Contract clause prohibiting age discrimination (A-24-25). The March 18, 1983, age discrimination grievance was filed with OMRDD directly (A-24).

On January 3, 1983, Kleinmann began what would become a three-month medical leave of absence (A-21), the State's doctors corroborated that the medical leave was needed due to job stress surrounding reassignment of January 3, 1983 (A-21).

In late January, 1983, the State of New York announced a planned series of layoffs to address budget difficulties. This set in motion a timetable wherein

each State agency, including OMRDD, submitted proposals for staff cuts to the State Division of the Budget for approval, modification or disapproval. The Division of the Budget is a State entity wholly separate from OMRDD which ultimately determines whether a particular position (item) will be abolished (A-598-599).

At that time there were four fully funded and budgeted Administrative Assistant positions in OMRDD, as well as one fully funded and budgeted Senior Administrative Assistant position which was filled by Clyde Niles, the same position that Kleinmann had performed satisfactorily up to January 3, 1983. Niles was younger than Kleinmann (A-11) and had less seniority with State government.

Of the four remaining Administrative Assistant positions, one was filled by Kleinmann, another by a Ms. Ziemke, also younger and with less seniority than Kleinmann (A-12-13, 220-224, 238). The remaining two positions were fully funded but vacant, held for two people who, at that time, were provisionally appointed to other positions: A. Hass serving as a provisional Grade 23, Contract Management Specialist, and D. Gerrish, provisional Assistant Director of County Services, Planning and Administration (A-595, 605-606).

The District Court found that OMRDD abolished the Administrative Assistant positions of both Kleinmann and Ziemke (A-13), however, the evidence at trial revealed that only Ziemke's position was abolished. The State Division of the

Budget did not approve the abolishment of Kleinmann's position as shown in Exhibit 69, official form issued by the Budget Division for either approving or disapproving OMRDD's plan (A-133-134) since Kleinmann's line item is not included (A-442-443). This fact is critical, OMRDD did not follow State Law in laying off Kleinmann.

It was revealed finally that OMRDD originally sent out a total of 29 layoff letters to employees based in its Albany main office. Kleinmann, age 57, was the only person actually laid off in a program division of 147 people (A-654, 684, 704-709). The record proves this was no accident.

The process followed by OMRDD to insure that Kleinmann was denied the "bumping," "retreat," and "recall"

rights afforded other employees scheduled for layoff is the centerpiece of Kleinmann's claim of age discrimination and claim of retaliation.

TARGETING FOR LAYOFF

Under New York State Civil Service Law, an employee whose position is eliminated in a layoff has "bumping", "retreat" and "recall" rights. A significant portion of the District Court trial was spent in demonstrating the difference between these three rights.

"Bumping" refers to rights of a employee selected for layoff to displace another employee with fewer years of State service in the same Civil Service job title and in the same layoff unit. (See New York State Civil Service Law Section 80 at A-365(1)). Kleinmann was

an Administrative Assistant, or Junior Administrative Assistant in OMRDD in Albany, New York, and had the right to displace any Administrative Assistant who had fewer years of service, as long as such position was in Kleinmann's layoff unit (A-704-709). The layoff unit for Kleinmann included the Central Office payroll and two other OMRDD facilities in the area surrounding Albany. At the time of the layoff there was one other Administrative Assistant but no Junior Administrative Assistants in Kleinmann's layoff unit. The second Administrative Assistant job was abolished. When OMRDD told Kleinmann he would be laid off, he had no one to "bump," even though two Administrative Assistant positions with OMRDD remained vacant and funded after the layoff. Under Civil Service Law,

Kleinmann did not have the right to bump into the Senior Administrative Assistant title even though he had performed that precise job until January 3, 1983.

Civil Service Law also gave Kleinmann the right to "retreat" or displace persons with fewer years of State Service who were in positions which he had previously filled. At least one such position in OMRDD was denied Kleinmann.

Finally, once Kleinmann was laid off he had "recall" rights to any open position in State service for which he was eligible. Specific job titles Kleinmann was eligible for were published by the New York State Department of Civil Service. This is called a "preferred list," (A-446-453), a compilation of positions having the same or similar job duties as an Administrative Assistant.

Kleinmann ultimately claimed a position from this recall list. However, there was at least one "same" or similar job which was denied Kleinmann to which he should have been appointed at the time of his layoff.

Kleinmann's discrimination claim focuses on the decision to eliminate his position as Administrative Assistant. The State laid off all persons holding Administrative Assistant items in Kleinmann's layoff unit, however, only one position was abolished. Thus under the State's theory, accepted by the District Court, since both Administrative Assistant positions were eliminated, Kleinmann could not prove that his age was the determining factor in deciding who would remain after he was laid off. This theory is based on an inappropriate

standard of proof for a layoff case (A-714-716).

The District Court did not recognize proof that the State specifically targeted Kleinmann's job. By surgically targeting Kleinmann's position the State then raised the Civil Service Law as a shield. The District Court erred by not addressing the critical steps taken in initally targeting Kleinmann (A-701-714).

The proof is clear starting with the admission by the person who targeted Kleinmann's job for layoff, Cuite. When Cuite targeted Kleinmann he believed that Kleinmann was the only person who held the position of Administrative Assistant, that Kleinmann would therefore be laid off if the Administrative Assistant position was eliminated (A-701-714). Cuite also knew that he was under no

obligation to select any particular job title for elimination, nor was he given a quota of people for layoff (A-701-702). Kleinmann was targeted even though vacant positions could have been abolished, which would have accomplished precisely the same budgetary savings (A-598-599).

Cuite similarly could have eliminated the Senior Administrative Assistant position, which would have given incumbent Clyde Niles the right to bump any less senior person in either the Administrative Assistant or Junior Administrative Assistant positions. Under this scenario Kleinmann, being more senior, would not have been laid off.

OMRDD could have eliminated other job positions, many held by probationary and/or provisional people (A-428-429, 559-563). A probationary or provisional

employee is afforded only limited rights under State law and has less rights vis-a-vis Kleinmann than a "permanent" employee. Under any of these alternatives Kleinmann would not have been laid off since he was older and had more years of service.

By targeting only Kleinmann's job, Cuite erected the shield of the Civil Service Law because Kleinmann was not eligible to bump Niles in the higher grade position, and there was no one in the Junior Administrative Assistant position to bump. Niles was younger and less senior than Kleinmann (A-600).

The evidence before the Court revealed that Kleinmann was on "approved" sick leave from January through April, 1983. During this time he had filed two formal grievances challenging his reassignment

as a form of discrimination (A-163-200). Cuite stated he made the decision to target Kleinmann for layoff, knew about the sick leave (A-597-598) and that Kleinmann had filed grievances challenging Cuite's decision to reassign him. Nevertheless, Cuite marked Kleinmann's position for layoff, knowing that Kleinmann was the only person who would be laid off because of abolishment of the Administrative Assistant position (A-700-702). The District Court ignored the lack of evidence that the abolishment of Kleinmann's position was approved by the Division of the Budget. Finally, Cuite targeted Kleinmann's position although there were many vacant, funded positions in OMRDD, including federally-funded items. Elimination of these positions would have had the same effect

on the budget (A-689-700).

RETALIATION

There is no doubt that by March 18, 1983, both Raymond Rockwell, OMRDD Assistant Director of Personnel, and Charles Devane, OMRDD Director of Human Resources, were aware of Kleinmann's two formal reassignment and age discrimination grievances (A-614-629, 647).

By the time the initial determination was finalized in April, Kleinmann had filed two grievances and had formally complained to the Affirmative Action Officer.

After receiving both grievances, Rockwell also took steps to deprive Kleinmann of his right to claim the Computer Programmer position transferred to OMRDD, effective April 1, 1983. This

was a Grade 18 position occupied by a probationary appointee serving in the position as a Grade 14 (A-25). There is no dispute that Kleinmann was entitled to the position (A-25) or that he was entitled to the position until the May 4, 1983 effective date of his layoff from his Administrative Assistant position. There is no dispute that normal practice at OMRDD at that time was to notify an employee of retreat position to allow opportunity to think about the position and claim it two weeks prior to effective date of layoff (A-593, 721). This two-week time frame would have placed the normal notification date at April 20, 1983, giving Kleinmann two weeks to consider whether he would accept position prior to May 4, 1983, layoff date.

Kleinmann was orally informed about

retreat position on March 18, 1983, by Rockwell and told Rockwell that he wanted to think about it. Rockwell then sent Kleinmann a letter dated March 23, 1983, stating "we consider you to have declined the retreat option." Kleinmann actually accepted the retreat item in writing on April 7, 1983 (A-721). The State treated Kleinmann in a discriminatory manner by failing to allow him the customary two week acceptance period.

Despite the fact that Kleinmann accepted the position approximately three weeks before it was to take effect, and two weeks prior to the State's usual timetable for even notifying a person of retreat rights, the State refused to permit Kleinmann to retreat. The State kept a probationary employee significantly younger than Kleinmann in a

position Kleinmann was entitled to occupy (A-27).

Kleinmann was also deprived of his right to displace, Bonnie Raines, a provisional M.R. Program Planner I (A-24-25) who was significantly younger than Kleinmann (A-27). Despite her provisional status in a position Kleinmann was clearly qualified to perform, Raines remained in the provisional position and the State laid off Kleinmann.

POINT I

THE SECOND CIRCUIT COURT OF APPEALS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHICH CALLS FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION

The instant case is marked by a complex procedural record. This case has been subject to extensive legal

proceedings, both administrative and judicial all marked by inadequacies, inconsistencies and errors which serve only to continue to deprive Kleinmann of his Constitutional rights of due process, equal protection of the law, and right to property. These rights have been denied Kleinmann because he happened to be a 57 year old man, in a State funded item, who somehow did not meet the personal criteria of a new Deputy Commissioner, Cuite (A-654).

One of the basic elements of due process is the right to a competent, effective counsel of choice. Before the close of Plaintiff's case, mid-way in the trial, Kleinmann petitioned the Court on the record for a continuance for the purpose of obtaining new trial counsel (A-501-514). Kleinmann's request was

denied by District Court Judge Cholakis on the record (A-514-515). Kleinmann's statements on the record clearly established a basis for his dissatisfaction with his then trial counsel.

Kleinmann was the party seeking redress, the one who would be prejudiced by any further delay in the case; therefore, a continuance sought by the party whose position would be in even the slightest jeopardy of damage caused by further delay, should have been given benefit of the short continuance requested (A-501-514). Although most cases dealing with requested continuances relate to criminal matters, the Sixth Amendment issues and the basic right to counsel are applicable to instant action.

In United States v. Calabro, 467 F.2d

973 (2d Cir, 1972), the Second Circuit Court of Appeals pointed out, that issue of waiver of right of counsel must be determined on a case by case basis. Id at 985. Cases in numerous state courts across the country have stressed the litigant's right to be fully represented in civil as well as criminal cases as a basic constitutional right. Times Publishing Company v. Burke, 375 So.2d 297 (Dist. Ct. of App. Fla., 2d Dist 1979); Neeley v. Board of Trustees, Policemen's and Firemen's Retirement System, City of Wichita, 473 P.2d 72, 205 Kan. 780, (S.Ct. Kan. 1970); Jackson v. Independent School District No. 16 of Payne County, 648 P.2d 26 (S.Ct. OK. 1982). The right of the civil litigant to such independent counsel as a basic right of due process cannot be abridged,

even during the course of a trial. The right of a civil litigant to consult freely with counsel during the course of trial, when abridged by action of the trial court in the way of limitation of such free access, has been held to constitute an infringement on the right to counsel. R.B. Potashnick v. Port City Construction Company, 609 F.2d 1101, rehearing denied 613 F.2d 314, cert. denied 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

This Court in Richardson-Merrell, Inc. v. Koller, etc, et al. 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed 2d 340 (1985) concerning the right to counsel of ones choice at pages 438 and 439 stated

> ...If the nature of the right to representation by counsel of one's choice is that "[it] is not violated absent some specifically demonstrated prejudice," ibid, then a disqualification order, though

> "final", is not independent of the issue to be tried. Only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced. If respondent were to proceed to trial and there receive as effective or better assistance from substitute counsel than the disqualified attorney could provide any subsequent appeal of the disqualification ruling would fail.

This Court went on in Richardson-Merrell, Inc. v. Koller, etc et al. to conclude that an order disqualifying counsel in a civil case can not be completely separated from the merits. Action of the District Court with regard to denial of Kleinmann's request for time to obtain new counsel is inextricably tied to merits of this action and directly contributes to denial of due process to Kleinmann which permeates this case.

Other aspects of this case at trial level raise the possibility of conflicts

of interests which are so interwoven in the merits of this case that they warrant further review by the Court.

Maeve Tooher, Law Clerk to Judge Cholakis at time of Kleinmann's June 1989 trial, was married to Terrence Tracy, an attorney employed by the office of the Attorney General of the State of New York. This fact did not become known to Kleinmann until after trial concluded. Since the State was and is a party defendant to this litigation and was and is defended by the office of the Attorney General of the State of New York, the appearance of potential conflict exists.

This same clerk of District Court Judge Cholakis was subsequently employed by the firm originally handling the appeal for Kleinmann. This fact was disclosed to Kleinmann after he had

retained this new counsel and the appeal process had begun. Kleinmann was told that a "chinese wall" would be built around the attorney handling the appeal so that no conflict or appearance of conflict of interest would be possible. Kleinmann reluctantly acquiesced based upon those assurances. Only when Kleinmann became aware that Ms. Tooher was the counsel assigned to represent Clyde Niles, the individual who had originally displaced Kleinmann from his position as administrative assistant to Cuite, did Kleinmann decide to remove the case from the appellate counsel then representing him.

The appearance of conflict has permeated this record, particularly with respect to District Court Judge Cholakis' law clerk. This Court has stated, in

relation to 28 U.S.C. Section 455, the importance of promoting public confidence in the integrity of the judicial process. Finding in the case of Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), that scienter is not required to find a violation of Section 455(a), this Court enunciated the rule that:

> The judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that "his impartiality might reasonably be questioned" by other persons. . . . Moreover, advancement of the purpose of provision to promote public confidence in the integrity of the judicial process, . . . does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew. Liljeberg, 486 U.S. 847, 108 S.Ct. 2194, at 2202-2203 (citations omitted).

The Fifth Circuit in the case of Hall v. Small Business Administration, 695 F.2d

175 (5th Cir. 1983) vacated the judgment entered by a magistrate based on a finding that the magistrate's law clerk had accepted employment with a law firm representing the plaintiffs in that case. No suggestion of actual impropriety was found in that case; however, the court held that the magistrate's failure to recognize that his law clerk's conflict of interest created an appearance of impropriety which was adequate cause for reversal. In following the Hall decision, the Fifth Circuit in Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796 (5th Cir. 1986) (the lower court holding in the Liljeberg, 486 U.S. 847 case), the Circuit Court of Appeals stated:

> Where a reasonable person would only speculate that a judge might have actual knowledge of the facts, constructive knowledge does not exist.

> In the present case, however, an objective observer would firmly expect that Judge Collins would have actual knowledge of Loyola's [his clerk's] interest in the case.

Health Services Acquisition Corp., 796 F.2d at 802. The same is true in the instant case, an objective observer would firmly expect that Judge Cholakis would have actual knowledge of his clerk's possible interest in and potential conflict involving the Kleinmann action.

This Court has again confirmed the need for diligence by judges with respect to such potential conflicts and has enunciated the principle that when a judge harbors any doubts concerning whether or not his disqualification is required, this should be resolved in favor of disqualification. United States v. The State of Alabama, 828 F.2d 1532, 1540 (11th Cir. 1987), per curiam, cert

denied sub. nom., 487 U.S. 1210, 108 S.Ct. 2857, 101 L.Ed.2d 894 (1988).

In the case of Hunt v. American Bank & Trust Company of Baton Rouge, Louisiana, 783 F.2d 1011 (11th Cir. 1986), the court set forth an appropriate yardstick to measure such appearance of impropriety:

> Absent actual bias, disqualification is necessary only if a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality. R.B.Potashnick v. Port City Construction Co., 609 F.2d 1101, (5th Cir.), rehearing denied, 613 F.2d 314, cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). It is true that a reasonable person might wonder about a law clerk's impartiality in cases in which his future employer is serving as counsel. Clerks should not work on such cases, just as a judge should not hear cases in which his business associates are involved. A "clerk is forbidden to do all that is prohibited to the judge." Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983); see also Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596 (5th Cir. 1977). Hunt, 783 F.2d at 1015.

The factual pattern in the case of Parker v. Connors Steel Company, 855 F.2d 1510 (11th Cir. 1988) is very similar to the occurrence at the trial level in the instant case. In Parker, the clerk in question was the son of a partner in the law firm representing defendants Connors and H.K. Porter. Here, the law clerk in question was the wife of a member of defense counsel's legal staff, and also, by implication of employment, one of the named defendants. In Parker, the court stated:

> A law clerk, as well as a judge should stay informed of circumstances that may raise the appearance of impartiality or impropriety. And when such circumstances are present appropriate actions should be taken. Parker, 855 F.2d at 1525.

It would be hard to believe that Maeve Tooher was not aware of her marriage to Terrence Tracy and the job which he held

with the State of New York.

These possible conflicts are inextricably tied to the merits of the case and the results below. While singly they may not constitute reversible error, together the cumulative prejudice to Kleinmann's rights is obvious.

Other procedural missteps further underscore the need for this Court to exercise its supervisory authority. EEOC issued a finding that a violation of Kleinmann's rights occurred in the manner in which his layoff was effected (A-233-240), violating the Age Discrimination in Employment Act (ADEA, 29 USC. Sections 621 et eq.) The regional office of the EEOC in Buffalo originally had prepared a draft complaint to intervene in Kleinmann's already pending suit (A-356-361), but was overruled by a vote of the

members of the Commission in Washington, D.C. . This action, combined with the failure of the District Court to give any weight whatsoever to the EEOC determination, raises a question of undue influence.

While an EEOC determination is not binding on a District Court, it should be accorded some weight. Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978). This Court has recently discussed the weight to be accorded the decision of a State Agency in Astoria Federal Savings and Loan Association v. Solimino, 111 S.Ct. 2166, 111 L.ed.2 96 (1991). Administrative determination of either a State or Federal agency, while not conclusive upon the District Court, must be accorded some weight in its decision. The Court below failed to accord any

weight to the EEOC determination and failed to explain why it ignored this determination. Such a finding, or lack thereof, effectively precludes Kleinmann from attaining a complete and proper appellate review.

Complicating the procedural maze created by this case are the issues created by the handling of the matter on appeal. After first remanding to the District Court for further findings, the Second Circuit then denied Kleinmann's appeal without decision. This was further complicated when the Second Circuit Court failed to make any decision regarding Kleinmann's pending Rule 40 motion.

Dealing with the issue of failure of the Second Circuit to render a decision with respect to the still pending Rule 40

motion for reargument, in the event that this Court does not grant Kleinmann's petition for certiorari, appellate review will be defeated if a writ of mandamus does not issue. State of Maryland v. Soper, 270 U.S. 9, 29-30, 46 S.Ct. 185, 70 L.Ed. 449 (1926). The Second Circuit never has issued any decision relating to the original Rule 40 Motion for Reargument. The issuance of a decision by that Court in relation to a Rule 35 Motion for Rehearing En Banc does not resolve the matter of the underlying and still outstanding Rule 40 Petition for Regargument. Pursuant to the Federal Rules of Appellate Procedure, Kleinmann's filing was for a Reargument. The ruling on a Rule 35 Petition for Rehearing En Banc in no way vitiated that original filing and the underlying nature of the

original motion.

In instances in which no other adequate means of attaining relief is available to a party litigant, this Court has held that a writ in the nature of mandamus is an appropriate remedy. Ex Parte Republic of Peru, The Ucayali, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). In Lusardi v. Lechner, 855 F2d 1062, (3d Cir. 1988) at 1069, the Court pointed out that when the court below has committed an error of law, such writ may issue. Although the general rule that a writ of mandamus will not issue for the purpose of controlling the exercise of judicial discretion, such writ may issue for the purpose of compelling the exercise of such judicial discretion.

The issue of the law of the case set forth in Judge Cholakis' decision compels

the exercise of discretion in favor of the granting of the writ of mandamus. In his decision dated June 20, 1990, Judge Cholakis, as the law of the case found:

> FOURTH: This court does not necessarily pass upon the correctness of the decisions made by the state agencies but merely determines whether their actions were retaliatory in nature. (A-29)

The issues before Judge Cholakis required a determination by the trier of fact in a trial de novo as to the correctness of the decisions. (Federal Rules of Civil Procedure 52(a) A-771)). This determination required the Second Circuit, on appeal, to direct its attention to this issue, as set forth in Appellant's brief below. Failure to address this issue left Judge Cholakis' determination as the law of the case, which, when coupled with the above mentioned EEOC Letter Decision (A-233-

240), is another compelling basis upon which the request for the grant of this petition for certiorari and upon which the granting of a writ of mandamus is founded. The Third Circuit Court of Appeals in Lusardi, 855 F.2d 1062, considered issues of procedural fairness related to age discrimination cases and pointed to such problems not being cured by mere language. Kleinmann has been denied such procedural fairness at all stages of this proceeding and the granting of this petition for certiorari or writ of mandamus properly would issue from this Court as a partial remedy in an attempt to cure such basic procedural defects.

Finally, if the petition for certiorari is denied, then mandamus is a proper remedy based on the failure of the

State of New York to enforce its Civil Service Laws. By the very testimony of the State's own employees, neither Kleinmann's name nor job line item number appeared on the form BD-98 (A-132-135) required to effectuate his layoff (A-41-59). These acts of those in authority to execute the Civil Service Laws and promulgated rules by the Department of Civil Service and by the Division of the Budget, by way of implementation (A-247-355) clearly are ministerial in nature. Although these cases generally are considered in state courts, the same issues are applicable in federal cases where no other adequate remedy is available. Booker v. Reavy, 281 N.Y. 318, 23 N.E. 2d 9 (1939).

If a writ of certiorari is not granted, Kleinmann has no other avenue

open to him to compel the Second Circuit to render a decision with respect to his Rule 40 Motion for Reargument; to compel the lower court to adhere to the law of this case as set forth in the decision of District Court Judge Cholakis, and finally to compel enforcement of Civil Service Laws mandated for enforcement in the State of New York, subject to the regulation of the EEOC as set forth in its letter opinion (A-238-240) dealing specifically with age discrimination found to have occurred in the firing/termination of Kleinmann.61

POINT II

THE SECOND CIRCUIT COURT OF APPEALS DECIDED A QUESTION OF FEDERAL LAW i.e., AGE DISCRIMINATION CLAIM, IN A MANNER WHICH IS IN CONFLICT WITH RULINGS OF OTHER CIRCUITS AS WELL AS WITH DUE PROCESS AND EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT

The Equal Employment Opportunity Act

of 1972 placed public employers, including States and municipalities "employers" within the meaning of 42 U.S.C. Section 2000e, et seq. Extending further federally-based protection to public employees, the Age Discrimination Employment Act, 29 U.S.C. Section 623(d) also affords federally based protection to employees in the public sector. These statutes constitute the foundation of rights establishing the firm basis of Kleinmann's claims.

Acceptance of Federal funding for other parties by the employer herein granted Kleinmann the protection of the Equal Protection Clause regardless of, and in this case despite, State Law. Louisiana, et al. v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed 2d 709 (1965); Swann v. Charlotte-Mecklenburg

Board of Education, et al., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed 2d 554 (1971); Hishon v. King & Spalding, 678 F. 2d 1022 (11th Cir. 1982); Calderon v. Martin County, 639 F. 2d 271 (5th Cir. 1981). Discriminated against on the basis of age, retaliated against for asserting rights, and permanently impeded in exercising State contract rights, Kleinmann was fired under color of fiscal responsibility while two (2) vacant Administrative Assistant positions remained fully budgeted and funded (A-646-647, 679-682, 702-715).

In Thompson v. Gallagher, 489 F. 2d. 443, (5th Cir. 1974), the court considered issues of equal protection and due process under the Fourteenth Amendment and dealt with the issue of a state action under the color of state law

as constituting a bill of attainder prohibited under the Constitution. In that case, the propriety of a municipal ordinance requiring that only those honorably discharged from the military be hired by the city if such employees or prospective employees had ever served in the military was considered. Addressing the question of whether or not a public employee had an interest in his job which was Constitutionally protected the Court held:

> The Fourteenth Amendment is a general prohibition against arbitrary and unreasonable government action. It no longer suffices to say that although a government may not deprive someone of a right arbitrarily, it may do so in the case of a privilege. Goldberg v. Kelly, 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L.Ed. 2d 287 (1970), Shapiro v. Thompson, 394 U.S. 618, 627 n. 6, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969). The right-privilege distinction has been rejected as a method of analysis in Fourteenth Amendment cases, because the question is not whether a person has a right to

> something denied by the government, but whether the government acted lawfully in depriving him of it. Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed. 2d 90 (1971), and cases cited therein at 539, 91 S. Ct. at 1598, "One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law." Homer v. Richmond, 110 U.S. App. D.C. 226, 292 F. 2d 719, 722 (1961), cited in Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 6 L. Ed. 2d 1230 (1961). Thompson , 489 F.2d at 446.

Kleinmann has not asked to "go to Baghdad", but has asked to keep his job, the job which the State has admitted he performed satisfactorily (A-9) and which the State, also by its own admission (A-132-134) never abolished.

The Second Circuit Court of Appeals implicitly found that there was no violation of Kleinmann's rights. That Court in so holding clearly violated its own standard established in Dwyer v.

Regan 777 F.2d 825 (2d Cir. 1985) modified at 793 F.2d 457 (2d Cir. 1986). In that case, while not involving an allegation of age discrimination, the Court stated at p. 830 (777 F.2d 825) quoting from this Court in Cleveland Board of Education v. Loudermill 470 U.S. 532, 105 S.Ct. 1487, 1491-92, 84 L.Ed. 2d 494 (1985):

> The point is straightforward: The Due Process Clause provides that certain substantive rights--life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Arnett v.

> Kennedy, supra, 416 U.S. [134,] 167, 94 S.Ct. [1633,] 1650 [40 L.Ed.2d 15] [(1974)] (Powell, J., concurring in part and concurring in result in part); see id., at 185, 94 S.Ct., at 1659 (White, J., concurring in part and dissenting in part).

In Dwyer, the Second Circuit found that a permanent (civil service) State employee would have the right to a due process hearing provided that employee could establish that he had been targeted for a termination (layoff is the equivalent) and had actually demanded such a hearing.

Kleinmann was a permanent employee in the classified civil service and has demonstrated that his position was targeted for layoff (termination). He also requested every type of available administrative remedy. Kleinmann's rights are not less than Mr. Dwyer who happened to be an attorney. The unusual procedures followed by the Second Circuit

in this case as set forth herein, would seem to be applying a different standard than that Circuit did in Dwyer as well as a standard in conflict with that applied by the Fifth Circuit Court of Appeals in Thompson v. Gallagher, 489 F.2d 443. As in most of the other proceedings found below in this tangled procedural web, the standard applied to Kleinmann is different and in violation of his rights to due process and equal protection Cleveland Board of Education v. Loudermill, 488 U.S. 946, 109 S.Ct. 377, 102 L.Ed 2d 365. In accordance with its own newly adopted rules and regulations, the State violated Kleinmann's rights. Issuing to Kleinmann, in the form of the fabricated BD-98 (A-457, 462-480), a form of a bill of attainder, the monolithic State trampled the rights and privileges

of its citizen.

Kleinmann's choice of becoming a public employee did not relinquish his constitutionally guaranteed rights.

> ...[J]ust as a public employee does not give up his First Amendment rights when he begins receiving a pay check from the government, neither does he give up his right to due process of law. The Fourteenth Amendment stands for the proposition that the government must act, when it acts, in a manner which is neither arbitrary nor unreasonable. This stricture is in addition to those which restrict the government from acting in a manner which impinges on freedom to speak or associate, or to be free from self-incrimination. It is one which most certainly applies not only to the government as policeman but also to the government as employer. Public employees are every bit as protected by the Fourteenth Amendment's safeguards as is the rest of the populace. Grausam v. Murphey, 448 F. 2d 197 (3 Cir.1971), Buckley v. Coyle Public School System, 476 F.2d 92 (10 Cir., 1973), Fitzgerald v. Hampton, 152 U.S. App. D.C. 1, 467 F. 2d 755 (1972). Thompson v. Gallagher, 489 F. 2d at 447.

The District Court found that failure to reinstate Kleinmann was result of

determination of non-comparability by the Department of Civil Service and not resulting from any retaliatory intent by the State, (A-26) however, Kleinmann's position was not abolished as proven by Exhibit 69. (A-132-135).

The Court held in Thompson v. Gallagher:

> The question is whether the challenged statute is a rational means of advancing a valid state interest. A regulation not reasonably related to a valid government interest may not stand in the face of a due process attack. Likewise, a classification which serves no rational purpose or which arbitrarily divides citizens into different classes and treats them differently violates the equal protection clause. Thompson v. Gallagher, 489 F.29 at 447.

It is unknown if a valid governmental interest exists or is at stake in the instance case. The entire question of force reduction was handled through

Departmental directive (A-41-59, 247-355), the ground rules for handling of all cases of force reduction were set forth in governmental directives (A-247-355) and required administrative steps for implementation were enumerated. Kleinmann was singled out for special treatment.

The burden of going forward with evidence of legitimate, non-discriminatory reasons for Kleinmann's layoff was not met. As this Court held in Board of Trustees of Keene State College, v. Sweeney, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed 2d 216 (1978), Plaintiff has the right, after the articulated "legitimate" business reason is proffered by Defendants, to show that either the alleged reason was not valid or that those alleged reasons were a

cover-up or pretext. Cuite's testimony (A-575-720) on its face, cannot stand this test. By his own testimony, Cuite established his manipulation of Kleinmann into the position from which Kleinmann could be targeted, and was targeted again by Cuite for layoff. Kleinmann, meeting the test of Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977) succeeded in proving that an illegitimate reason played a part in the State's motivation and it failed to come forward with any proof that this adverse action would have been taken in the absence of the proven illegitimate reason. Berl v. County of Westchester, 849 F.2d 712 (2d Cir. 1988); Davis v. State University of New York, 802 F.2d 638 (2d Cir. 1986).

Clearly the lower Court erred in its

factual finding with respect to Kleinmann's proof in relation to this matter. Although Kleinmann now has a heavy burden to meet the test set forth in Fed. R. Civ. P. 52(a), this clearly has been met and surpassed. The Second Circuit in Berl v. County of Westchester, 849 F.2d at 715 succinctly stated,

> "...we may overturn it only if we are left 'with the definite and firm conviction that a mistake had been committed.' Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)."

In this matter, a mistake has been committed.

The EEOC found that the layoff was in violation of federal statute prohibiting age discrimination. Kleinmann's firing as in the Thompson v. Gallagher case, 489 F.2d at page 448, "...not only fails to further the purposes of the act, it actually subverts them."

In Berl v. County of Westchester, 849 F.2d at page 715 that Court recognized, "Evaluation does not occur in a vacuum." Kleinmann's layoff did not occur in a "vacuum" rather it occurred as part of a carefully orchestrated plan of both discrimination and retaliation, documented by the State's witness, Cuite. The plan of discrimination was documented in writing for Cuite by Rockwell setting forth "...the chronology of Mr. Kleinmann's layoff." (A-392-394, 649-652, 663-667, 674-676) According to testimony, Kleinmann was the only employee for which such "chronology" was prepared, and such "chronology" according to Cuite's testimony, was a document which was not prepared in the ordinary course of the State's business. (A-392-394, 649-652) Even claiming business

reorganization, attempted cost savings and workforce reduction, the State cannot use the cloak and pretext of legitimate business reason to violate a citizen or employee's civil rights. The Second Circuit has stated:

> We merely hold that even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons; see Williams v. General Motors Corporation, 656 F.2d 120, 129-30 (5th Cir. Unit B, 1981), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed. 2d 655 (1982), just as it may not fire unqualified employees who would not be fired as such but for their age.

Hagelthorn v. Kennecott Corporation, 710 F.2d 76 (2d Cir. 1983) at 81.

The State, by its own admission, conceded that Kleinmann was qualified. No valid, legitimate business reason has been established for Kleinmann's termination.

Reduction in force matters cannot be treated the same as termination or

replacement cases, and in such cases, plaintiffs are not held to the burden of proving replacement by a younger employee. Williams v. General Motors Corporation, 656 F.2d 120, 124 (5th Cir., Unit B, 1981); cert. denied, Kleinmann is entitled to the protection afforded to him by 29 U.S.C. Section 621(b), and should not be denied the federally guaranteed protection afforded by that statute. This Court specifically has held that any burden of proof requiring that several must suffer discrimination before one could assert a claim of discrimination is inconsistent with equal protection guarantees of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). Kleinmann has met his burden and now must be afforded the federally

guaranteed protection of his civil rights. As clearly articulated in Montana v. First Federal Savings and Loan Association of Rochester, 869 F.2d 100 (2d Cir. 1989):

> But where, as here, the plaintiff claims not that her employer used poor business judgment in discharging her but that her employer used the structural reorganization as a cover for discriminatory action, a federal court, to ensure that the business decision was not discriminatory, is not forbidden to look behind the employer's claim that it merely exercised a business decision in good faith.

Montana, 869 F.2d, at 106.

Continuing in Montana, the Court further interpreted this principle:

> See also Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir.1985) (courts must refrain from second guessing decision making process, but must allow employees to show that employer acted in an illegitimate or arbitrary manner), cert. denied, 474 U.S.829, 106 S.Ct. 91, 88 L.Ed. 2d 74 (1985). To hold otherwise would effectively insulate an employer from the constraints of

> federal antidiscrimination law during any structural reorganization or reduction in force. Montana, 869 F.2d at 106

This Court consistently has protected plaintiff's rights in such cases and has mandated retrial in cases much less clear-cut than the instant action. McDonald Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). Judge Cholakis did not deal at all with issues of pretext or cover-up. However, in dealing with issue of retaliation the District Court, specifically held "This Court does not necessarily pass upon the correctness of the decisions made..." (A-29) That Court had a duty to ensure that the business decision was not discriminatory or retaliatory and that Court's decision failed to deal with these issues in the

manner prescribed by existing case law.

CONCLUSION

Pursuant to Rule 10.1(a) of the Rules of this Court, the Petition for a Writ of Certiorari should be granted or in the alternative, a Writ of Mandamus issue exercising the supervisory authority of this Court to insure protection of Kleinmann's rights.

Respectfully Submitted,

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